SUPREME COURT, U. S.
Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-551

BERNARD INO BUTLER,
PETITIONER

VS.

STATE OF ALABAMA,
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the Appellant's conviction is reported as follows:

Butler v. State, 55 Ala. App. ____, 316 So. 2d 348 (1975)

The Supreme Court of Alabama overruled the Petitioner's petition for writ of certiorari to review the judgment and opinion of the Court of Criminal Appeals of Alabama and the order is reported as follows:

Butler v. State, 294 Ala. ____, 316 So. 2d 355 (1975)

JURISDICTION

The Petitioner is seeking the writ under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Does a state law which provides that a girl under the age of twelve can neither consent to carnal knowledge nor be an accomplice to such criminal conduct deny one criminally accused the right to confront his accusor and equal protection of the law where such law denies the accused the application of the rule that an accused cannot be convicted on the uncorroborated testimony of an accomplice?

2. Is there a denial of due process and of the right to remain silent when a police officer is allowed, after showing full compliance with *Miranda* and standards of voluntariness, to testify that the accused refused to make a further statement and wished to consult his attorney and to testify that the accused was questioned with regard to a murder investigation where there were no objections during the testimony specifying grounds of inadmissibility?

3. When the trial court uses its discretion without abuse in exercising control over the conduct of the trial is there a denial of due process and of the right to remain silent?

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is making his claim under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The Petitioner was indicted by the Grand Jury of Montgomery County, Alabama for carnal knowledge of a girl under the age of twelve years. Petitioner entered a plea

of not guilty. After trial the jury entered a verdict of guilty and set the punishment at twenty years. The trial court then adjudged the Petitioner guilty and sentenced him accordingly. (R., pp. 1, 2, 3)

During the course of the trial the judge, after considering the questions outside the presence of the jury, ruled that the question of whether the victim was a prostitute or not and therefore consented and the question of whether or not she was an accomplice were completely immaterial under state law when petitioner was being tried for the offense of carnal knowledge of a girl under the age of twelve years. (R., pp. 28-34) The evidence clearly showed that the prosecutrix was eleven years of age when the crime was committed. (R., pp. 27, 40)

The trial judge also properly allowed the state, after showing complete compliance with both *Miranda* and voluntariness standards, to elicit testimony about statements made by the accused indicating that he wished to stop answering questions and to consult his attorney and to elicit testimony that the accused was being questioned in the course of a murder investigation where there were no objections to those questions specifying grounds of inadmissibility. (R., pp. 73, 75-77, 82, 83, 84, 95)

The record in the instant case clearly reveals that the phrase "legal evidence" does not appear on Page 98 of the Record.

ARGUMENT

I

THE DECISION BELOW IS CLEARLY CORRECT

The decision of the Court of Criminal Appeals of Ala-

bama is in line with long and established principles of law in Alabama and in other jurisdictions.

Petitioner argues that the prosecutrix was an accomplice of the accused and that he could not be convicted on her uncorroborated testimony. The Court of Criminal Appeals correctly held that the prosecutrix, an eleven-year-old girl and an admitted prostitute, could not under state law consent to carnal knowledge and could not be an accomplice to such criminal conduct. Title 14, Section 398, Code of Alabama 1940, Recompiled 1958.

When there is an offense of this nature committed against a girl under the age of consent, she cannot be an accomplice, and the rule of Title 15, Section 307, Code of Alabama 1940, Recompiled 1958, requiring corroboration of testimony has no application. The Alabama Supreme Court considered this point in *Noble v. State*, 253 Ala. 519, 520, 45 So. 2d 857, 857 (1950):

> "The first contention is that since the act was with her consent, she was an accomplice and, therefore, that defendant could not be convicted on the authority of Denton v. State, 17 Ala. App. 309, 85 So. 41; Section 307, Title 15 Code. That was on a charge of incest in connection with a woman over the age of consent. But when it is as to an offense in connection with a girl under the age of consent, she cannot be an accomplice, and the rule has no application. Duncan v. State, 20 Ala. App. 209, 101 So. 472."

This principle is also followed in other jurisdictions. *State v. David*, 226 La. 268, 76 So. 2d 1 (1954). And in *Regina v. Tyrell*, 17 Cox C.C. 716, 719 (1893) that Honorable Court held that an under age girl cannot be convicted of car-

nal knowledge of herself even if the undisputed evidence is that she invited, enticed and encouraged the act of intercourse.

The Court of Criminal Appeals also correctly held, based on the procedural law of Alabama, that no proper objections were made to testimony of a police officer that the accused stated that he would answer no further questions and wished to consult an attorney and that accused was being questioned in a murder investigation. It affirmatively appears from the record that such testimony was admitted only after full compliance with *Miranda* and voluntariness standards.

The testimony cited in the Petition from pages 76 and 77 of the record was given outside the presence of the jury. Petitioner also quotes from pages 83 and 84 of the record. The objection found at the bottom of page 83 came after the answer was given and was general in nature. The Court of Criminal Appeals, applying the procedural law of Alabama, correctly held that the trial court could not be held in error for overruling an objection, general in nature, coming after the answer was given. *Lucky v. State*, 50 Ala. App. 324, 278 So. 2d 772 (1973); *Nichols v. State*, 267 Ala. 217, 100 So. 2d 750 (1958). Other jurisdictions follow similar procedural rules. *Boring v. State*, 253 So. 2d 251 (Miss. 1972), cert. den. 405 U.S. 1040; *Norman v. State*, 302 So. 2d 254 (Miss. 1974).

There is no objection found on page 84 of the record. Counsel for accused asked merely that an answer be excluded. The Court of Criminal Appeals correctly held that where no objection was made and no ground for the motion to exclude the answer was given there was no error. *Miller v. State*, 48 Ala. App. 28, 261 So. 2d 447, cert. den. 288 Ala. 746, 261 So. 2d 45 (1972); *Ayers v. State*, 48 Ala. App. 743,

267 So. 2d 533 (1972). See also *Roseman v. State*, 293 So. 2d 64 (Fla. 1974).

Petitioner lastly contends that the trial court accused him of presenting no "legal evidence" and that the trial court continuously interrupted counsel's closing argument. The Court of Criminal Appeals correctly held that the trial judge in the instant case, while showing some impatience, was attempting to exercise his rightful control over the proceeding by moving the testimony expeditiously along and did not abuse his discretion in doing so. *Dolvin v. State*, 51 Ala. App. 540, 287 So. 2d 250 (1973); *Doss v. State*, 224 Ala. 90, 139 So. 290 (1932); *Vaughan v. State*, 236 Ala. 442, 183 So. 428 (1928); *Siebold v. State*, 287 Ala. 549, 253 So. 2d 302 (1970). See also *Baisden v. State*, 203 So. 2d 194 (Fla. App. 1967); *State v. Reeves*, 263 La. 923, 269 So. 2d 815 (1972); *Turner v. State*, 220 So. 2d 295 (Miss. 1969), cert. den. 396 U.S. 834.

It is evident that the Court of Criminal Appeals of Alabama correctly decided all questions now pending before this Honorable Court for review. Respondent urges this Honorable Court to uphold the validity of these long-established principles of law.

II

THERE IS NO IMPORTANT FEDERAL QUESTION

Where a state appellate court decision is in line with other decisions of that jurisdiction and federal law, such decision is not proper for review unless there exists an overriding public interest mandating such review. The instant Petition presents no question with overriding public interest mandating such review.

Petitioner first contends that he was denied his right

to cross-examine the prosecutrix, a right guaranteed under the Sixth Amendment, as to whether or not she was a prostitute. It is important to note that the prosecutrix was eleven years old at the time of the crime and could not under state law consent to carnal knowledge of herself. (R., pp. 27, 40) Petitioner was however, given ample opportunity for cross-examination on other points. (R., pp. 26-28, 34-50)

Respondent submits that no amount of cross-examination could have made the prosecutrix an accomplice of the accused and that the trial court in the exercise of its discretion properly refused to allow no further cross-examination on that point. None of the decisions cited by Petitioner deal directly with this point and it is apparent that full cross-examination of the prosecutrix was allowed so as to provide full compliance with the Sixth Amendment right of an accused.

Petitioner secondly contends that his right to remain silent guaranteed by the Fifth Amendment and his right to equal protection of the law under the Fourteenth Amendment and his right to be informed of the nature of charges against him under the Sixth Amendment were violated by the admission of certain testimony elicited from a police officer.

Petitioner cites *United States v. Hale*, ____ U.S. ____, 45 L. Ed. 2d 109, 95 S. Ct. ____ (1975), as authority for the proposition that evidence of silence at the time of arrest is inadmissible. This case is inapplicable here for two reasons. First, *Hale* deals with the question of whether evidence of silence of the accused is admissible during cross-examination of the accused for the purpose of impeachment. Secondly, in the instant case, accused did not stand silent. In the presence of the jury, the officer testified concerning compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966), and with standards of voluntariness. (R., pp. 79-81) The accused answered

some preliminary questions asked by officers and then stated that he would rather not say any more and that he wanted his lawyer. The interrogation then ceased. Full compliance with *Miranda* had been shown and neither Petitioner's rights under the Fifth Amendment nor his rights under the Fourteenth Amendment were violated.

Petitioner further contends that his right to be informed of the nature of charges against him under the Sixth Amendment was violated because of testimony that he was under investigation in connection with a murder investigation. Accused's counsel brought out these matters himself in his own cross-examination and elicited the favorable response that the accused was not charged in connection with that investigation. (R., pp. 84-91, 94-99, 102-103) At no time during the trial of the cause was there any testimony that the accused had been accused of, charged with, or convicted of any criminal offense other than the charge of carnal knowledge for which he was on trial.

The Court of Criminal Appeals of Alabama correctly held that there were no proper objections to such testimony specifying grounds of inadmissibility and that the trial court could not therefore be put in error. Respondent submits that the Alabama decision rests on adequate state grounds and involves only a question of state law. This Honorable Court has consistently held that it will decline to review state judgments which rest on an independent and adequate state ground and that it has no power to reverse a judgment on questions of state law. *Henry v. Mississippi*, 379 U.S. 443 (1965)

Petitioner also contends that his rights were denied under the Fifth and Fourteenth Amendments because the trial court stated that counsel had presented no "legal evi-

dence" and the trial court interrupted defense counsel during closing argument. Respondent would readily agree that an accused is always entitled to a fair trial which incorporates all principles of equal protection and due process of the law.

The Court of Criminal Appeals correctly held, however, that the trial judge was attempting to exercise his rightful control over the proceeding by moving the testimony expeditiously along.

The closing argument of counsel is not fully contained in the record. A reading of the recorded portions of closing argument reveals, however, that the interruptions of the court were made in response to objections raised by opposing counsel. Nothing in a review of the record in the instant case reveals any basis on which Petitioner can claim a denial of due process or equal protection based on the actions of the trial judge.

None of the three questions presented for review by Petitioner show an overriding public interest mandating review by this Honorable Court.

III

THERE IS NO CONFLICT OF DECISION

The decision of the Court of Criminal Appeals of Alabama is in line with decisions of all courts of the State of Alabama, with decisions of courts of other jurisdictions, with decisions of federal courts and with decisions of this Honorable Court. Petitioner has neither alleged nor shown any instance in which this decision is in conflict with any other decision. There is no question of first impression before this Honorable Court. Respondent submits that the decision

of the Court of Criminal Appeals follows applicable state and federal law including the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

CONCLUSION

Respondent submits that Petitioner has failed to allege or show unto this Honorable Court any ground for the issuance of the writ. Petitioner has failed to show a denial of any right under the Fifth, Sixth or Fourteenth Amendments to the United States Constitution. The State of Alabama, therefore, respectfully prays that the writ be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter S. Turner, one of the attorneys for the Respondent and a member of the Bar of the Supreme Court of the United States, and I, Carol Jean Smith, one of the attorneys for Respondent, hereby certify that on this ____ day of November, 1975, we did serve the requisite number of copies of the foregoing Brief and Argument of Respondent on the Honorable William J. Fuller, Jr., whose address is 242 Washington Avenue, Montgomery, Alabama 36104, attorney for the Petitioner, by mailing said copies to him at the aforesaid address with first class postage prepaid.

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